IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3015 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NASIMBANU W/O. GULSEN MOHMEEDBHAI QURESHI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3015 of 2004

MR MH BAREJIA for Petitioner No. 1

MS ARCHANA RAVAL, LD.AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE P.B.MAJMUDAR

Date of decision: 08/07/2004

ORAL JUDGEMENT

1. By filing this petition, the petitioner-detenue, who is a lady detenue, has challenged the detention order passed against her by the detaining authority, by its order dated 29.12.2003 under the provisions of the Gujarat Prevention of Anti-social Activities Act, 1985 ("PASA", for short). The petitioner is detained as a "bootlegger" under PASA. Along with the detention order, the petitioner was also served with the grounds of detention.

2. In the grounds of detention, there is a reference about five criminal cases registered against the petitioner under various sections of the Bombay Prohibition Act. It is alleged against the petitioner that the petitioner is dealing in foreign liquor and is transporting and selling the same. The authority, after considering the aforesaid cases and after considering the statements of witnesses, passed the aforesaid order, detaining the petitioner under PASA.

3. The learned Advocate for the petitioner submitted that the petitioner is a widow and she is a victim of circumstances, as she is required to maintain her family and two small children, because, there is no earning member, as her husband has already died. It is submitted that, except the five criminal cases under the Prohibition Act, the authority has not recorded the statements of any witnesses. It is further submitted that the cases under the Prohibition Act can, at the most, attract law and order situation, but not public order, as, according to her, there is nothing to show that the petitioner is acting in a high-handed manner or that she is disturbing public order.

4. Learned Advocate for the petitioner has relied upon the decision of the Division Bench of this Court rendered in L.P.A. No.223 of 2000, wherein in para 5, it is held as under :

> "5. If we examine the present case on the anvil of the test which has been applied by the Supreme Court in the case of K.S.Zala v. State of Gujarat (Supra), i.e. with regard to the presence of credible material and as to how the detaining authority has made the mention against the appellant being an obstruction to the public health and public order, we find that in the instant case so far as the statements of the witnesses which were recorded with regard to unregistered cases, that ground has been rejected by the learned Single Judge himself. It is, of course, true that after narrating the particulars of the criminal cases, the detaining authority has mentioned that the activities of the appellant were an obstacle to the public health and public order, but this bald observation cannot be taken to be decisive so as to arrive at the satisfaction that the activities of the petitioner were prejudicial to the public order or public health and that tempo of public life

was disturbed. No observation made in any part of the judgement can be read in isolation and bereft the context. The judgement is to be read as a whole and even the observations which have been made by the Supreme Court in para 6 of the judgement are to be considered in light of the earlier observations made in para 5 where presence of credible material before the detaining authority has been insisted upon. Thus, litmus test to find out as to whether it is a case of breach of public order or breach of public health is concerned, credible material has to be there. In the case of K.S.Zala before the Supreme Court, the detaining authority had also relied upon the statements of the witnesses so as to show that violence resorted to by the petitioner in that case had disturbed the even tempo of public life and the material on record had shown that members of the public of those localities had to run away from there and to go inside their houses and to close their doors. No such fact situation has been mentioned in the present case and the ground with regard to the statements of the three witnesses has been rejected by the learned Single Judge himself and it has been held that there had been violation or infringement of the petitioner's right against such statements. In this view of the matter whatsoever said by the three witnesses with regard to unregistered cases and with regard to the three incidents referred to hereinabove, it cannot be considered to be the material germane for the purpose of consideration of the threat to the public health and public order. Thus, the only material which remains is the registered criminal cases and that by itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to the public order and public health. Necessary material in this regard is totally wanting in the body of the detention order itself. In large number of cases, the Supreme Court has considered that involvement in bootlegging activities even if coupled with violence does not amount to threat to public order or public health. The mere mention of allegations unless they are supported by any material cannot be said to be material germane for the purpose of arriving at the satisfaction with regard to breach of public order or public health and we find that after giving particulars of criminal cases, the

> detaining authority by including certain allegations, not supported by any credible material has simply observed that the appellant's activities were an obstacle to the public health and public order. In this view of the matter keeping in view the observations made by the Supreme Court in the case of K.S.Zala v. State of Gujarat (supra) itself in paras 4 and 5, we do not find that it can be held to be a case of breach of public health and public order. Learned counsel for the appellant has also argued several other points before us, but we do not find it necessary to go into those grounds. It may be mentioned that it was not a case of breach of public order or public health and it was not argued before the learned Single Judge. Even if that be so, in such matters, the point which arises on the face of the facts of the case by the body of the order itself, which does not require further investigation of the facts, can certainly be allowed to be raised and we allow learned counsel for the appellant to raise this point and find that this point is not without substance. The impugned order passed by the learned single Judge upholding the detention order therefore, cannot be said to be in consonance with the settled position of law. The detention order deserves to be quashed and set aside on this ground alone. We, therefore, do not go into other grounds which were raised on behalf of the appellants."

5. Learned Advocate for the petitioner further submitted that, even otherwise, the allegation against the petitioner is that she is dealing in foreign liquor and it cannot be said that the same is injurious to the public health. It is submitted that at the time of passing the detention order, the petitioner was already in judicial custody in connection with cases No.3 and 4. It is further submitted that regarding case No.5, the petitioner was already on police remand. It is submitted that, in spite of the fact that petitioner is in judicial custody, it is mentioned in the order that, after submitting bail application at any point of time, the petitioner may continue her activity after getting the bail. It is further submitted that there is no material available with the authority for coming to the satisfaction that even though the petitioner is already in judicial custody, she will be released on bail. It is not stated as to on what basis the authority has reached the subjective satisfaction that the petitioner will

continue her alleged illegal activities again after getting the bail.

6. In this connection, learned Advocate for the petitioner has relied upon the decision of the Apex Court in Amritlal & Others vs. Union Government and others reported in AIR 2000 SC 3675, wherein it is held as under:-

"4. In Agustin's decision (1994 Supp (1) SCC 597) (supra) this Court also placed strong reliance on an earlier but oft-cited decision of this Court in Binod Singh v. District Magistrate, Dhanbad, (1986) 4 SCC 416 : (AIR 1986 SC 2090 : 1986 Cri LJ 1959) wherein it was held that if a person is in custody and there is no imminent possibility of his being released therefrom, the power of detention should not ordinarily be exercised. This Court held that there must be cogent materials before the officer passing the detention order that the detenu is likely to be released on bail. The inference must be drawn from the available material on record and must not be the ipse dixit of the officer passing the order of detention. It is in this perspective as above, that the recording of the concerned officer in the matter under reference ought to be noticed and the same reads as below:-

"Even though prosecution proceedings under Narcotic Drugs and Psychotropic Substances Act, 1985 have been initiated against Shri Amritlal, I am satisfied that there is compelling necessity in view of the likelihood of his moving an application for bail and in the event of his being granted bail, the likelihood of his indulging in illicit traffic in narcotic drugs as is evident from the trend of his activities, to detain him under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988."

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"6. The requirement as noticed above in Binod Singh's case (AIR 1986 SC 2090 : 1986 Cri LJ 1959) (supra) that there is 'likelihood of the petitioners being released on bail' that however

is not available in the reasonings as provided by the concerned officer. The reasoning available is the 'likelihood of his moving an application for bail' which is different from 'likelihood to be released on bail.' This reasoning, in our view, is not sufficient compliance with the requirements as laid down.

"7. The emphasis however, in Binod Singh's case (supra) that before passing the detention order the concerned authority must satisfy himself of the likelihood of the petitioner being released on bail and that satisfaction ought to be reached on cogent material. Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order."

7. So far as the aforesaid aspect is concerned, it is, no doubt, true that the authority has not stated as to on what basis the authority has reached subjective satisfaction that the petitioner will get bail on presenting the application for bail and she will start the alleged illegal activities again. There is no affidavit-in-reply filed by the department dealing with the point raised in the petition.

8. Considering the aforesaid aspect of the matter about not properly explaining as to on what basis the authority has reached the subjective satisfaction that the petitioner, on presenting the application, will be released on bail, and since the subjective satisfaction for reaching the said conclusion is not reflected on the record, the petition is required to be allowed. As stated above, the petition is not resisted by any affidavit-in-reply. The petition, therefore, is required to be allowed on the aforesaid point. It is further not necessary to examine the first point regarding the contention of law and order part.

9. Learned AGP Ms.Raval has vehemently submitted that the petitioner is repeating the same type of offences and is dealing with large quantity of foreign liquor. However, this aspect can be highlighted by the prosecuting agency before the competent court before whom bail application is pending. On this point, this Court is not required to express any opinion, as it is for the State Government to take appropriate action, if it thinks fit, in accordance with law.

10. So far as present petition is concerned, it is only connected with the order of detention passed by the detaining authority. If the petitioner is in judicial

custody, and she is not released on bail, it is for the authority concerned to oppose such application on its own merits. Releasing the petitioner from detention will have no bearing so far as the bail application is concerned and it is for the concerned Magistrate to consider this aspect whether the petitioner is a habitual offender etc., at the time of deciding the said bail application. In this behalf, of course, this Court is not expressing any opinion, as bail application is required to be decided by the Magistrate on its own merits and in accordance with law. This petition is required to be allowed only on the aforesaid point, as indicated above.

11. In view of what is stated above, this petition is allowed. The order of detention dated 29.12.2003 is quashed and set aside. The detenu, Smt.Nasimbanu, widow of Gulsan Mohmedbhai Qureshi, is ordered to be set at liberty forthwith, if she is not required in connection with any other case. Rule is made absolute.

(P.B. Majmudar, J.)

syed/